**Go-Mart, Inc./St. Mary's Refining Company, Single Employer *and* Oil, Chemical and Atomic Workers International Union, Local 3-590, AFL–CIO.** Case 6–CA–25463

September 14, 1995

## DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On April 7, 1995, Administrative Law Judge George F. McInerny issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order.

In agreeing with the judge that the Respondent did not violate Section 8(a)(5) of the Act on April 12, 1993,[3] by unilaterally selecting certain employees to continue employment with the Respondent after others were laid off, we emphasize the following facts.

Since February 2, the parties were engaged in effects bargaining over the Respondent's decision to close its facility on April 12. On April 5, the Respondent informed the Union that, after closing, it would continue to employ a residual work force consisting of a terminal manager, waste treatment operator, and a utility employee. The Respondent also provided the Union with the names of those chosen to fill the terminal manager and waste treatment positions.

On April 6, the Union requested certain information concerning the Respondent's selection process for filling the waste treatment and utility positions, including the names of the employees selected for these positions. The following day, the Respondent informed the Union that all of the requested information was available to the Union at the Respondent's facility, and would continue to be available through the April 12 closing. The Union, however, made no further attempt to obtain the information, and did not raise the issue again, until April 22.

In these circumstances, we find, in agreement with the judge, that the Union failed to act with due diligence in pursuing bargaining over the Respondent's April 5 proposal, and thus the Respondent's implementation of its proposal on April 12 was not unlawful. See *Goodyear Tire & Rubber Co.*, 312 NLRB 674 fn. 1 (1993). Accordingly, we shall dismiss the complaint.

## ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Charging Party asserts in its exceptions that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that these contentions are without merit.

[2] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] All dates are in 1993 unless stated otherwise.

*Barton A. Meyers, Esq.*, for the General Counsel.
*Roger A. Wolfe* and *Ken Surber, Esq. (Jackson & Kelly)*, of Charleston, West Virginia, for the Respondent.
*Larry G. Abel*, of Johnson City, Tennessee, for the Charging Party.

## DECISION

GEORGE F. MCINERNY, Administrative Law Judge. Based on a charge filed on April 20 and amended on June 23, 1993, by Oil, Chemical and Atomic Workers International Union, Local 3-590, AFL–CIO (the Union), the Acting Regional Director for Region 6 of the National Labor Relations Board (respectively, the Regional Director and the Board) issued a complaint in which it is alleged that Go-Mart, Inc. and St. Mary's Refining Company (the Company or Respondent) are a single employer, and that this Company has taken some actions, and failed to take others, thereby violating certain provisions of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act). Go-Mart and St. Mary's Refining Company filed separate answers in timely fashion, denying that they are a single employer, and also denying the commission of any unfair labor practices.

After several delays, the matter came on to be heard before me in Parkersburg, West Virginia, on June 8 and 9, 1994.[1] During the hearing, I was informed that additional charges had been filed. As a result, when all the evidence forthcoming in Case 6–CA–25463 had been received, I adjourned the hearing at the request of the General Counsel until September 12, 1994, pending resolution of the pending charges.

Thereafter, on July 7, 1994, I was informed by the General Counsel that the pending charges had been withdrawn. I then ordered this hearing closed. At the hearing all parties had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, to make motions and offers of proof, and to argue orally. The parties declined oral argument, but the General Counsel and the Respondent filed briefs, which have been carefully considered.

Now, based on the entire record, including my observations of the witnesses and their demeanor, I make the following

[1] The Respondent has moved to amend the transcript of this hearing. There being no objection, the motion is allowed, and the transcript is amended as requested.

## FINDINGS OF FACT

### I. JURISDICTION

The complaint alleges that Go-Mart and St. Mary's are West Virginia Corporations having their places of business in that State; that Go-Mart is engaged in the retail sale and distribution of food and grocery products and that St. Mary's is engaged in the manufacture and nonretail sale of petroleum products; that Go-Mart purchased goods valued at over $5000 directly from points outside the State of West Virginia and derived, in a 12-month period ending March 31, 1993, gross revenues of more than $500,000; and that St. Mary's purchased and received at its West Virginia location goods valued in excess of $50,000 directly from points outside the State of West Virginia and, during a 12-month period ending March 31, 1993, shipped goods valued at more than $50,000 directly to points outside the State of West Virginia.

The answers did not deny the Board's jurisdiction, and I find that Go-Mart and St. Mary's were and are engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. LABOR ORGANIZATION

The complaint alleges, the answers admit, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. *Background*

This case concerns an oil refinery located for some 50 years in St. Mary's, West Virginia, on the banks of the Ohio River. The refinery was built and operated for most of those years by the Quaker State Refining Company. For almost this same period, the employees have been represented by the Oil, Chemical and Atomic Workers Union.

In the late 1980s, Quaker State sold the St. Mary's operation to a company called Mid-Atlantic Fuels, which operated the refinery only until 1989, when it went into bankruptcy. The refinery was then sold to Phoenix Refining Company. Both of these companies continued a collective-bargaining relationship with the Union. Phoenix executed a collective-bargaining agreement with the Union effective from April 16, 1990, to April 15, 1992. Phoenix, however, did not survive until this contract expired, having itself gone into bankruptcy. In August 1991, the refinery was sold under order of the bankruptcy court to Go-Mart, Inc., one of the Respondents in this case. Go-Mart, in turn, established St. Mary's Refining Company to operate the facility. John Heater was president of Go-Mart during the events which make up this case, and Al Sweeley was vice president of St. Mary's Refining Company. The plant manager at the refinery was Robert Winland.

After the sale of St. Mary's, an International representative of the Union, Lowell (Pete) Strader, wrote to Heater notifying him of the Union's legal status, and requesting a meeting for purposes of negotiating a collective-bargaining agreement. Heater agreed, and a preliminary meeting was held between the parties on January 9, 1992. On January 28, 1992, Al Sweeley wrote to Strader informing him that the Company had received a petition from employees who thereby signified their desire no longer to be represented by the Union. The petition was signed by 29 employees out of 51 or so then employed at the refinery.

This action by the Company led to the filing of an unfair labor practice charge on April 10, 1992, by Larry G. Abel, another International representative and successor to Pete Strader in Case 6–CA–24468. There was no further formal action on the charge, but on July 13, 1992, the Company, by its attorney, Roger A. Wolfe, recognized the Union as the bargaining agent for the employees of the Company in consideration of the withdrawal of charges by the Union.

Another snag developed in August 1992 when the parties met again. At that time the Company alleged that only the production employees in the refinery were properly represented by the Union, and that the maintenance employees, who had constituted a part of the unit, were now employed by a outside contractor, Shawnee Construction. The Union went back to the Board, filing new charges in Case 6–CA–24787 on August 11, 1992. These charges ended up in an informal settlement agreement dated December 14, 1992, and further negotiations were scheduled to begin on January 12 and 13, 1993.[2]

#### B. *Stipulations and Admissions*

l. At the opening of this hearing the parties agreed to defer the question of whether Go-Mart and St. Mary's Refining Company are a single employer until the compliance stage of the proceeding.

2. Also, during the course of the hearing, counsel for St. Mary's[3] agreed on behalf of his client to amend St. Mary's answer to the complaint to admit:

> a. Paragraph 4 of the Complaint, that about August, 1991 St. Mary's purchased the business of Phoenix Refining Co., and since then has continued to operate the business as a refinery.
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> b. Paragraph 5, admitted that St. Mary's is a continuation of an employing entity and is a successor to Phoenix.
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> c. Paragraph 11, that the following employees of Phoenix constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:
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> > All production and maintenance employees employed by Phoenix at its St. Mary's, West Virginia facility, excluding office clerical employees, other salaried employees, and guards, professional employees and supervisors as defined in the Act.
>
> d. Paragraph 12, alleging that from about 1948 to about August, 1991, the Union has been the exclusive collective bargaining representative of the Phoenix unit employed by various predecessors, the most recent of which being Phoenix, and during that period of time the Union had been recognized as such representative by various predecessors, the most recent of which being Phoenix. This recognition has been embodied in successive collective bargaining agreements, the most recent

[2] All dates hereafter are in 1993, unless otherwise specified.

[3] Roger A. Wolfe appeared as counsel for both Go-Mart and St. Mary's.

of which expired by its terms on or about April 15, 1992.

e. Paragraph 13, since about March 31, 1992, the Union has been designated as exclusive collective-bargaining representative of Respondent St. Mary's Refining Company employees in the former Phoenix unit.

f. Paragraph 14, from about 1948 to about August, 1991, based on Section 9(a) of the Act, the Union had been the exclusive collective bargaining representative of the Unit employed by various predecessors, the most recent of which being Phoenix.

g. Paragraph 15, at all times since about August, 1991, based on Section 9(a) of the Act, the Union has been the exclusive bargaining representative of Respondent's employees in the former Phoenix unit.

All of the above allegations being admitted, I find all of them to be facts in this case.

### C. *The Decision to Close the Refinery*

When negotiations looking to a new collective-bargaining agreement finally resumed on January 12 and 13, the parties hardly had time to know each other, they had just exchanged a few proposals, before the Company[4] announced on June 13 that it had suffered ''significant financial losses during 1992''[5] and was, therefore, going to implement a permanent layoff and reorganization of the personnel at the refinery effective January 31. Nine employees were to be laid off, others would suffer reductions in salary and shifts of duties.

The parties were concerned about this reorganization and layoff at meetings on January 20, 21, and 29, together with further exchanges on contract proposals[6] and discussions of the coming layoffs. On February 2, an even more serious shock was in store for the Union. At that meeting, the Company presented a letter dated on that day, signed by Al Sweeley, and informing the Union with ''regret'' that the refinery was being closed on April 12 and that a number of employees would be permanently laid off.[7] The letter did state that ''present plans also call for the possibility of employing a few persons to oversee a small terminal operation, plant security, and upkeep of essential functions. There are presently no bumping rights.''

Attached to this letter was a list of 95 people, of whom 6 were described as supervisors, including Plant Manager Robert Winland. The others were Health and Safety Director Richard McCullough, Maintenance Supervisors Wayne M. Nichols and Kendall Stanley, Laboratory Supervisor Franklin G. Roby, and Process Supervisor Dale F. Calvin.

The union people present naturally expressed their ''astonishment'' and concern. Larry Abel immediately demanded that the Company bargain on the effects of the plant closure as well as continued bargaining on the new contract.

### D. *Effects Bargaining*[8]

The complaint alleges in paragraph 16 that about April 12, the Company selected certain employees to continue employment at the refinery, after others were laid off. The Company is alleged (par. 18) to have done this without prior notice to the Union and without the opportunity to bargain about this action, thereby violating Section 8(a)(1) and (5) of the Act.

Paragraph 19 of the complaint alleges that on April 6 and May 16, 1993,[9] the Union requested that the Respondent furnish information regarding a list of employees retained (on the job) by the Respondent, and a description of the process used by Respondent or its selection of these employees to remain on the job. In paragraph 20, the complaint alleges that this information was necessary for, and relevant to, the Union's performance of its duties as the exclusive bargaining representative of the bargaining unit (found here to be an appropriate unit). Paragraph 21 alleges that the Respondent failed to furnish or delayed in furnishing the requested information, again violating Section 8(a)(1) and (5) of the Act.

There is also no dispute that the Company had not advised the Union, until that time, who was going to remain after the closing.

But these incidents cannot be viewed in isolation. The evidence shows that the WARN notice given by the Company to the Union on February 2 contained the words, already noted above, that the Company's ''present plans'' contemplated the retention of ''a few persons to oversee a small terminal operation, plant security, and upkeep of essential functions.'' (GCX 41.) The Union was aware, and it certainly is logical to understand, that one can't just close down and walk away from an oil refinery, albeit a fairly small one, containing thousands of barrels of volatile liquids, storage tanks, piping of various kinds, docks on the river, and other administrative, storage, and refining structures, without some people present on the site to clean up, unload storage tanks and facilities, dismantle structures and piping complexes, and

[4] Roger Wolfe was the chief spokeman for the Company in all these negotiations. He was assisted by Robert Winland and sometimes another person who took notes. Larry Abel was the chief union spokesman. Pete Strader was there from time to time and a union committee composed of Andrew Remish, Leon Willis, Billy Joe Keith, and other employees.

[5] There was no question raised about the legitimacy of this claim. The Union requested that it be allowed to send an auditor in to look at the Company's books. The proposed layoff was postponed for a week to allow the audit to take place on February 2. The audit took place as scheduled, but the Union did not deny the Company's position except to point out one or twice that there was a lot of product in tanks on the premises which, if sold, could recoup some of those losses. I, therefore, infer and find that the Company's plea of poverty was borne out by the financial data revealed by the audit.

[6] There was a great deal of testimony introduced here, without objection, about discussion on these contract proposals, together with exhibits containing proposals by the Union and the Company for the new contract. It is clear, however, that all of this evidence is really irrelevant to the issues in the case. With certain exceptions, including reference to contract proposals concerning seniority and recall, I have not considered this evidence.

[7] This letter was issued under the Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. § 2102.

[8] Most of the time spent in 11 meetings held by the parties between February 2, when the closing announcement was made, and April 12, when the refinery closed, were taken up with either contractual matters or proposals dealing with the effects of the closure on the employees. Here, however, we are interested only in certain aspects of the contract, and the effects of the closure. I have gone over the entire record, and with respect to the so-called ''effects'' bargaining, I find that most of the evidence on that is not relevant or material to the limited issues important to the issues here.

[9] Due to inadvertent errors, these dates are given in the complaint as 1992.

provide security against damage, deterioration, and fire as well as the contemplated terminal operation.

The Union prepared and submitted to the Company on February 15, a list of proposals including one dealing specifically with what the parties referred to as ''residual'' work[10] on the refinery premises. This proposal would provide that ''the bargaining unit employees will perform all work at the refinery if the proposed closure occurs (such as clean up, environmental or any other work).'' (GCX 46.)

On February 16, the Company submitted its proposals for handling the effects of the closure of the refinery. The Company also addressed to residual work: ''All work which may remain at the facility after the plant closing, if any, including without limitation, demolition, clean up, environmental monitoring, security, maintenance and terminal operations, shall be assigned by the Company in its sole discretion. Such work remaining after the plant closing shall not be considered bargaining unit work, and the Company expressly reserves the right to use independent contractors, contract out, or subcontract any and all of such work.'' (GCX 48.)

This Company's proposal was specifically rejected, and the Union held its own position on residual work in its proposals for February 16 (GCX 49).

In a set of effects proposals dated February 22, the Company revised its proposal on residual work, limiting its option to contracting the work out to ''independent contractor(s)'' (GCX 51). The Union countered this proposal by maintaining its own current proposal (GCX 46), and by rejecting the Company's proposal (GCX 52).

These positions remained, substantially unchanged, through meetings and exchanges of proposals on February 23 and March 2, 3, and 8. On March 23, the Company revised its residual work proposal to provide that such work would be ''assigned by the Company at the Company's sole and exclusive discretion'' (GCX 67). The Union also revised its proposal, stating that all of this work ''will be assigned by seniority[11] of those qualified to do the work'' (GCX 68).

These positions continued through the March 24 meeting. On April 5, Roger Wolfe, attorney and chief spokesman for the Company, presented a new wage proposal. He added two handwritten rates, one for utility personnel and another for waste treatment operator. There were new rates and, according to Larry Abel, were higher than other proposed rates for similar jobs.

This started a discussion about who was going to be working in the plant after the shutdown.[12] Wolfe replied that the Company had decided to have a terminal operation, but much smaller than the refinery itself. He told the Union that Winland would be the terminal manager, and that the waste treatment operator would be Richard McCullough, the health and safety director, and a supervisory employee. The Company would keep one person in the utility job, but Wolfe did know on April 5 who that would be. The job would involve cutting grass and things like that.

Abel then asked how the Company had chosen McCullough. Wolfe replied that they had considered everybody in the plant for the waste water treatment operator. Abel pressed him on the criteria used in the selection, and Wolfe said that all qualifications were considered.

These was another bargaining session on the next day, April 6.[13] Abel had prepared and gone to the Company's representatives to present a request for information, as follows:

> In order for the OCAW Local 3-590 to evaluate your proposals from yesterday and so we can properly request the following:
>
> 1. As you are aware your company supplied the Union with an inventory sheet indicating a huge inventory in February, 1993. Please supply an updated inventory sheet showing the inventory left at your facility. Also please supply the inventory that has been sold, moved, or in any way disposed of and the monies that was received from this product. Please supply the estimated cost of all current inventory. Our audit would appear that the losses you are claiming that you have incurred would be minimal once the products are accounted for.
>
> 2. As you are aware you have stated only two employees are being kept after April 12, 1993. Since there are a number of employees qualified both as utility and the waste water area, please supply this list of names considered and each one's qualifications. Also please supply the individuals names that was selected and the determining factors that you used in selecting the same.
>
> Since you have proposed an approximate 25% reduction in wages, benefits etc., this information will help us better provide a counter proposals [sic] on the economic issues.[14]

After these requests were presented, the parties continued to negotiate. The Company presented a new proposal on residual work:

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[10] For brevity's sake, I will refer to this work throughout as ''residual work.''

[11] I would note that the parties never did agree on a definition of seniority. The Union maintained that seniority should run from the time employees were originally employed in the refinery, whether the employer was Quaker State, Mid-Atlantic, Phoenix or St. Mary's, some employees having 26 to 40 years at this location (GCX 40). The Company, partly at least on the basis that no prior employment records were made available to it when it took over the property, held out for seniority to be computed from the date of hire by St. Mary's Refining Company, beginning in August 1991 (GCX 53).

[12] Abel testified that, several times during negotiations, he had asked Wolfe this question, but was met by the answer that Wolfe did not know what work was going to be done, and who was going to do it. Wolfe did not deny this, but said that he really did not know. He said the Company was searching for funds, or low-interest loans, to continue operations and that he had no instructions on what to say about what residual work was to be done, or who was to do it.

[13] At this point the factual bases for the two complaint allegations come together. As a matter of procedure I will complete the factual history of both in a chronological way, then discuss each allegation separately.

[14] The Respondent, in its brief, makes a comment that ''economic issues have nothing to do with the residual workforce.'' Economic issues however could have a bearing on the Company's decision to close down the refinery. I will treat the request for data on the retention of residual workers on its own merits, apart from the information about products remaining on the property or otherwise disposed of.

> All residual and incidental work which may remain at the facility after the plant closing, if any, including without limitation, demolition, clean-up, environmental monitoring, upkeep and terminal operations, shall be assigned by the Company as the Company reserves the right, however, to contract out maintenance projects such as filter house removal; maintenance of pumps, values, and associated equipment; ground maintenance, including moving; painting; installing pipeline from ranks to loading rack and river dock; demolition; and similar maintenance projects, provided that no such contracting out shall be undertaken to replace the bargaining unit employees who may still be employed at the time of the contracting out. [GCX 76.]

An additional request for information was written out by Abel at this meeting and given to Wolfe. The information sought was the costs of tankermen's rates for loading and unloading barges, and written job descriptions of the two new classifications proposed by the Company (for the residual jobs). (GCX 78.)

Toward the end of the April 6 meeting, Wolfe told Abel that they were going ahead with McCullough, but they did not yet know who was going to fill the utility job. Abel asked when the Company would supply the data he had requested, and Wolfe answered that he would have it by the next Monday, April 12. Wolfe said that he would be on vacation out of town the next week but they set up meetings for April 22 and 23.

Abel was concerned that he would not have the data on criteria for selection of people to remain at the refinery. Winland said that he would get the information together before April 12. Abel suggested that Wolfe and Winland go back to the refinery, pull the information together, and come back. He said ''we'll stay here until we can work this thing out.''

Wolfe declined to do that. He did not consider it feasible,[15] but he said that he realized that he had to get the information together as soon as possible. Abel said that when the Company got the information they should contact Leon Willis or Andy Remish, and Abel would tell the Company how to proceed. After the union people left, Wolfe told Winland that they had to make decisions about who they were going to keep, get this information to the Union, and bargain about it. As they talked, Winland said he could have the information by the next day. Wolfe tried to find the union people, but they had left the meeting place. They tried to call Andy Remish, a union committeeman, at home, but failed to reach him. Wolfe then told Winland to get all the personnel files, resumes, and applications and have them ready to sit down and talk with the Union, going over each and every person employed at the refinery. Wolfe then left on vacation.

Up to this point there has been no dispute as to the facts I have related, as well as facts which I have indicated I do not view as material. There are slight but significant differences over what happened in the 2 days following the April 6 meeting. Larry Abel had gone to Ashland, Kentucky, to negotiate with another company called Mark West Hydrocarbon. Following Wolfe's instructions, Robert Winland spent the morning of April 7 putting the information together. Sometime that morning he talked to Remish and told him that he would have the information available that afternoon and asked him to get in touch with Abel and they would talk about it. After lunch, Winland saw Remish again and asked him if he had contacted Abel. Remish said no, but told Winland where Abel could be reached. Winland then called Abel at a Holiday Inn in Ashland. Abel was not there, but he returned the call around 3 o'clock that afternoon.[16] According to Winland, he told Abel that he was going to have the information ready that afternoon, and that he would be available at any time up to April 12. Abel said that he would ''get with my committeemen and I'll get back to you.''

Abel's testimony was in agreement with Winland's up to the point of describing their conversation. Abel stated that after a casual exchange of pleasantries, Winland said that he had ''the list of the names of the folks that was going to be kept at the refinery.'' Winland asked Abel if he would like to come by the refinery and pick them up. Abel replied that he was in Ashland[17] and couldn't pick them up, but asked that Winland fax or mail them to him. Sometime, a day or two after that, Abel said he received two letters listing employees to be retained at the refinery.[18]

Abel did not mention that Winland talked to him about any other information which had been requested, nor did Abel testify that he even asked for that additional information. He explained, while he was on the witness stand that he saw no point in going to St. Mary's because he knew that Wolfe was going to be on vacation, and that another negotiation session was already scheduled for April 22.

I found Abel to be an honest witness, but his memory was not good, and his failure to mention an issue, the information about criteria used to pick the residual employees, and the qualifications of all the employees at the plant, which he had previously maintained was important for continued bargaining, can be attributable either to a memory lapse or a tacit admission that the information was not as important as he had said it was. This was further borne out because he did nothing further about the requested information until at least April 23, almost 2 weeks after the refinery was closed.

I found Winland's testimony more logical, in the light of what had been said at the close of the April 6 meeting. His explanation that he could not see sending over 90 personnel files, applications, and resumes at that time is also reasonable and logical. Thus, I credit Winland's testimony that he told Abel on the telephone on the afternoon of April 7 that he had the information, that Abel replied that he would get with

[15] And, being an experienced management lawyer, he probably did not want to become involved in a sure-lose, all-night bargaining situation.

[16] Abel did not recall whether the call was received and returned on April 7 or 8. The Respondent introduced Company telephone records placing the outgoing call from St. Mary's to Ashland at 1:07 p.m. in April.

[17] I would estimate Ashland as being over 100 miles from St. Mary's.

[18] These were GCX 79 and 80 signed by Albert F. Sweeley Jr. and addressed to Larry Abel in Johnson City, Tennessee. There is no indication that they were sent to Ashland, or that Abel received them before April 9 or 10. Abel did say that his negotiations in Kentucky did not extend into the weekend.

his committee and then contact Winland, and that he did not do that until the matter was brought up again on April 22.[19]

These facts show that the Company here notified the Union 69 days before the scheduled closing of the plant that the plant was going to close, and that a scaled down terminal operation was contemplated, involving the continued employment of some employees. Thus, the notice that some employees were to be retained was not postponed or presented to the Union as a fait accompli on April 6, 7, or 8. Both Abel and Wolfe testified that the subject of what employees would be retained was brought up several times during extended meetings between February 2 and April 12, the closing date. On each occasion Abel asked who was to be retained, and Wolfe right down to April 5 said he didn't know. There was nothing which would have prevented the Union from requesting bargaining, or making proposals dealing with the positions which would logically have to be filled in a refinery closing situation. But the Union did not do that.

There were discussions, although there was no testimony, and no evidence except the lists of proposals exchanged during negotiations, which are included as exhibits here, about seniority, and about recall. These particular subjects were important to the issue here. As I have noted, the Union wanted seniority to date from first employment at the site; the Company would restrict seniority to employment be with St. Mary's Refining Company. On recall, the Union proposed seniority, later modifying this to seniority with qualifications. The Company insisted on complete discretion in recall or retentions, later modifying this to allow some consideration of seniority. But the parties were far apart, and without an agreed-on definition of seniority, there was no common ground on which they could discuss recall or retention of employees.

Aside from these barriers to agreement,[20] I believe that there was an area of retention of employees, which the Union, having received timely notice, failed to pursue. I cannot hold the Respondent responsible for the Union's lack of diligence in this area, and I do not believe that the Respondent has failed to give appropriate notice of its intent to retain employees at the St. Mary's Refinery after April 12, 1993, in violation of Section 8(a)(1) and (5) of the Act. See *Jim Walter Resources*, 289 NLRB 1441 (1988); *Haddon Craftsmen*, 300 NLRB 789 (1990).

The complaint also alleges that since about April 6, 1993, the Company has failed, or delayed, to furnish information requested by the Union on April 6 and on May 12, 1993.

There is no real issue as to the allegation of failure to furnish the information. There never was any indication in the record that the Respondent refused or failed to comply with any of the many requests for information made from February 2 until after May 12, 1993.

With respect to the question of unlawful delay, I note my findings above on the April 6 request. There, I found that the requested information was compiled on April 7, the day after the request, and on that same day the Union was notified of the availability of the information at the refinery in St. Mary's, West Virginia. Larry Abel, I have found, told Robert Winland that he would get hold of his committee and notify Winland of what they were going to do. He never did notify Winland, and never did come to the refinery to look over the materials which were there available to him.

Later, on April 23 and in writing on May 12, Abel complained that he had not received the information he had asked for on April 6, and which, I infer and find, was still available at the refinery, which was still operating as a terminal. After some correspondence back and forth, the parties finally got together on June 10, and went over the documents and records originally requested on April 6.

There is no indication that the delay was in any way occasioned by the fault of the Company. At the point when time was of primary importance, the period between the request for information on April 6, and the closing of refinery operations on April 12, the evidence shows that the Company expedited the preparation of the requested materials, made them available to the Union, and notified the Union of their availability.

Later, after the refinery was operating with residual employees, there was no apparent reason, nor any evidence in this record, that any delays, say from May 12 to June 12, caused any prejudice to the Union in its fulfillment of its bargaining obligations.

In this instance, also, I can find no violations of Section 8(a)(1) and (5) of the Act.

## CONCLUSIONS OF LAW

1. Respondents Go-Mart, Inc. and St. Mary's Refining Company are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Oil, Chemical and Atomic Workers International Union, Local 3-590, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondents did not commit any unfair labor practices as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

## ORDER

The complaint is dismissed in its entirety.

[19] After the meeting of April 23 there was some correspondence on the missing information. The matter was not finally settled until a meeting of June 10, when the parties spent several hours going over the files of all of the former employees of St. Mary's Refining Company.

[20] There was no indication in this record that bargaining on these issues would have been futile. *Owens-Corning Fiberglas Corp*., 282 NLRB 609 (1987).

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.